

No. 13352

United States
Court of Appeals
for the Ninth Circuit.

JULES D. GRATIOT and AIR-MAZE
CORPORATION,

Appellants,

vs.

FARR COMPANY, a Corporation,

Appellee.

Supplemental
Transcript of Record
Volume IV
(Pages 1161 to 1169)

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILED

MAY 18 1953

PAUL P. O'BRIEN

CLERK

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**Appeal from the United States District Court for the
Southern District of California
Central Division.**

In the United States Court of Appeals
for the Ninth Circuit

Appeal No. 13,352

JULES D. GRATIOT and AIR-MAZE
CORPORATION,

Appellants,

vs.

FARR COMPANY, a Corporation,

Appellee.

APPELLANTS' MOTION
UNDER RULE 75

Now come the appellants in the above-entitled appeal and hereby respectfully move, under the provisions of Rule 75(h) of the Rules of Civil Procedure, that the attached order be entered and the record on appeal be supplemented in the manner set forth in such order.

It is hereby certified that this motion is believed to be well founded in law and fact, and that it is not interposed for the purpose of delay.

In support of this motion, appellants will rely upon the facts and reasons stated in the affidavit of counsel attached hereto.

Dated: October 31, 1952.

Respectfully submitted,

OVERTON, LYMAN, PRINCE
& VERMILLE;

HYDE, MEYER, BALDWIN &
DORAN,

GEORGE S. BALDWIN;

HARRIS, KIECH, FOSTER &
HARRIS,

FORD HARRIS, JR.,

DONALD C. RUSSELL,

By /s/ FORD HARRIS, JR.,

Attorneys for Appellants.

[Title of Court of Appeals and Cause.]

ORDER

Upon motion duly made, and for good cause shown, it is hereby ordered that:

(1) Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, filed in the District Court on or about February 16, 1951, shall be considered a part of the record on appeal, and the Clerk of the District Court shall certify and transmit the same forthwith to the Clerk of the Court of Appeals.

(2) The following portions of said Memorandum shall be printed under the direction of the Clerk of the Court of Appeals as a supplement to the printed record on appeal, and the same shall be added to the printed record on appeal and, together with the unprinted portions thereof, may be considered by the Court on this appeal:

Page 1, lines 1 to 18, inclusive;

Page 3, line 25, to and including the word "strip" in line 30;

Page 4, line 26, to page 5, line 19, to and including the word "angle";

Page 5, line 29, starting with the word "This," to page 6, line 17, inclusive;

Page 7, line 19, to and including the word "application" in line 28;

Page 18, lines 4 to 14, inclusive;

Page 19, line 27, to page 20, line 15, inclusive;

Page 30, lines 10 to 18, inclusive.

Dated: November 10, 1952.

/s/ WILLIAM DENMAN,

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,

United States Circuit Judges.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF FORD HARRIS, JR.

State of California,

County of Los Angeles—ss.

Ford Harris, Jr., being duly sworn, deposes and says:

(1) That affiant is counsel of record for appellants in the above-entitled action.

(2) That a stipulation to the same effect as the contents of the attached Order was by letter requested of Lyon & Lyon, counsel for appellee, on or about October 28, 1952; that on October 30, 1952, by telephone, Mr. Richard F. Lyon, counsel for ap-

pellee, advised affiant that appellee refused to so stipulate in substance or effect.

(3) That the matter sought to be added to the record on appeal by the foregoing motion and order was omitted from the record on appeal by the error and accident of affiant.

(4) That the matter sought to be added to the record on appeal is material to the rights of appellants and its presentation of its appeal herein; that such matter sought to be added contains statements by appellee in the District Court relative to the nature of the alleged invention of the patent here in suit, and affiant believes that such statements will be helpful to this Court in determining this appeal; that the material sought to be added is attached hereto as "Exhibit A."

(5) That appellants' opening brief is due for filing on November 10, 1952, but that appellee's time for filing its answering brief has not commenced to run.

(6) That the granting of the foregoing motion, in affiant's opinion, cannot prejudice appellee in any way or delay the filing of the briefs in this appeal.

/s/ FORD HARRIS, JR.

Sworn and subscribed to before me this 31st day of October, 1952.

[Seal] /s/ VIRGINIA L. LAFFERTY,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires July 21, 1954.

EXHIBIT A

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 9759-PH

FARR COMPANY, a Corporation,

Plaintiff,

vs.

JULES D. GRATIOT and AIR-MAZE
CORPORATION,

Defendants.

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO MOTION FOR SUMMARY
JUDGMENT*

“The form of the Farr filter shown in the patent in suit differs from some of the forms shown in the earlier application in providing an air passage having an angled or an abrupt change in direction. It is this passage which is the essential element of the claims of the Farr patent in suit—not the presence or absence of a flat wire strip.

“The Farr air filters departed from this conventional practice in arranging the wire screens so that the air was intended to flow substantially parallel to the plane of the screen. Application Serial No. 285,904 discloses various forms of air filters of this type. The first form is illustrated in Figures 1 to 4

*[Original memorandum filed Feb. 16, 1951.
U.S.D.C.]

of Application Serial No. 285,904. In this form of air filter there is employed, in addition to a frame, a number of strips of crimped or corrugated wire screen. The corrugations or crimps of alternate strips are caused to incline in opposite directions relative to the direction of the air flow, more particularly illustrated in Figure 3 of Application Serial No. 285,904. Two important characteristics of this form of the Farr filter are to be noted, first, that, as pointed out by the defendants, i.e., between the alternate corrugated strips of wire screen there is not employed any flat strip of wire screen, and, second, that there is no bend or angle in the crimps or corrugations of the strips but that such strips or corrugations form a passage by means of which air can flow entirely through the filter without having either to change direction or to flow through any of the wire screens.

“In Figures 5, 6 and 7 of the application there is shown a form of the invention in which between each pair of crimped or corrugated wire screens there is placed an additional strip of flat wire screen, and in Figures 8 and 9 of the application there is shown a form of filter in which the crimps or corrugations of the wire screen change in direction or angle.

“This angled form of the crimped or corrugated wire is a very important feature of the Farr invention, and, as shown hereafter, is present in the form of the invention shown in the patent in suit, is made an important element of all of the claims of the patent in suit which are at issue in this case, and is

an important element of defendants' accused infringing device.

“One point in connection with Figures 8 and 9 of Application Serial No. 285,904 may be noted, that is that the application does not disclose directly whether any flat wire strips are to be employed between the corrugated strips. We believe obviously the inference is that either practice may be utilized.

“This application was acted upon but once by the Patent Office Examiner, who rejected all of the claims of the application irrespective of their breadth or scope. It was within the six months period, which under the statute Farr had to reply to this action of the Patent Office Examiner, that Farr filed his application for the patent in suit. Thus Application Serial No. 285,904 had not lapsed and was not abandoned when the application for the patent in suit was filed. The application for the patent in suit was thus, in legal effect, a step in the prosecution of the Application Serial No. 285,904.

“The best, and possibly only, proven form of the Farr invention (as shown hereafter from the affidavits and exhibits appearing in the file history of the application for the patent in suit) is the form of filter shown in the patent in suit. The particular form of filter shown in the patent in suit utilizes crimped or corrugated wire screens, the corrugations of which had an angle therein to prevent the direct flow of air through such passages. That form of the invention was illustrated in the earlier application, 285,904, only by Figures 9 and 10 of the application.

“As indicated we have already shown that the earlier filed Farr Application Serial No. 285,904 showed several forms of the Farr invention but only one of these forms of the Farr invention include a crimped or corrugated screen wire which had a bend or an angle in the crimp or corrugation. This is the form of the invention shown in Figures 8 and 9 of the Application Serial No. 285,904. When the application for the patent in suit was filed it was this form of the invention which is the form specifically illustrated and throughout the prosecution of the application for the patent in suit the importance of this angle in the corrugations or crimps of the filter was emphasized.

“Any fair reading of the prosecution of the Farr application for the patent in suit demonstrates that from start to finish of that prosecution Farr asserted that his invention resided in these passages changing in direction; that this was the invention sought to be claimed. This form of the Farr invention was illustrated in Figures 8 and 9 of the earlier application, 285,904, is the only form of the invention shown in the application for the patent in suit, and it is clearly and specifically claimed in the claims in suit. Such invention was never abandoned. The contention of defendants that the file history of the patent in suit indicates any abandonment by Farr of the angled passages or of any filter including such angled passages such as would permit defendants' device to be excluded from the claims of the patent in suit, is in plain, direct conflict with the facts as exhibited in the file history itself. De-

fendants' accused air filter actually includes the very essence of the particular form of the Farr filter which the file history shows was consistently claimed by Farr to be his sole invention and which the file history of the Farr application shows clearly the Patent Office Examiners intended to grant to Farr.

“It is respectfully submitted that Defendants' Motion for Summary Judgment must be denied.

“LYON & LYON,

“LEONARD S. LYON,

“By RICHARD F. LYON,

“RICHARD E. LYON.”

Service of copy acknowledged.

[Endorsed]: Filed November 4, 1952, U.S.C.A.